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Information Security Oversight Office
Washington, DC 20405



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April 25, 1988

OS REGISTRY

29 APR 1988

MEMORANDUM FOR: Rae M. Huffstutler
Deputy Director for Administration
Central Intelligence Agency

FROM: Steven Garfinkel *Steven Garfinkel*
Director, Information Security Oversight Office

SUBJECT: Possible permanent legislation regarding
limitations on nondisclosure policy

John Elliff, a senior staff member of the Senate Select Committee on Intelligence, has referred to me the enclosed material relating to the proposed amendment of 5 U.S.C. § 7211 and 5 U.S.C. § 2302. The intent would be permanent substantive legislation similar to Section 630 of Public Law 100-202, placing limitations on the executive branch's authority to impose nondisclosure policies on classified information.

Elliff advised me that the draft legislation had been referred to him by staff of the Senate Governmental Affairs Committee, who suggested that it might be offered as an amendment to pending legislation that would amend the Ethics in Government Act. They had referred it to Elliff to seek his views. He, in turn, advised them that he would need to consult with certain officials in the executive branch to hear their reaction before forwarding his own views. He specifically asked for our "informal" views, even to the extent that he was looking for a telephone response or responses.

To discuss our options and recommendations, I will chair a meeting of representatives from the National Security Council staff, the Departments of State, Defense and Justice, and the Central Intelligence Agency on Wednesday, April 27, at 2:00 p.m., in my office. It is located in Room 6046 of the General Services Administration Building, 18th and F Sts., N. W. Please call Dorothy Cephas at 535-7251 with the name(s) of your representative(s). Because of space limitations, please limit the number of your representatives to no more than two.

Enclosure

Amending 5 USC Section 7211: (underlined language is new; textual language in parentheses is deleted).

No nondisclosure policy, form, agreement, order or agency action may prohibit or (sanction) impose a penalty for any oral or written disclosure of (1) information protected by Section 2302(b)(8) of this Title, or (2) any national security information other than that specifically and properly marked as classified; or, unmarked but known by the employee to be classified; or, unmarked but known by the employee to be in the process of a classification determination. Nor, may any nondisclosure policy, form, agreement, order or agency action directly or indirectly obstruct, by requirement of prior (written) authorization, limitation of authorized disclosure, or otherwise, the right of any individual to (1) petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress, or (2) disclose information covered by Section 2302 (b)(8) of this Title.

(Enforcement) The courts for the district in which the individual resides, where the violation occurred or in the District of Columbia are authorized to issue injunctions, declaratory judgments, or any other appropriate relief against any policy, rule, order, regulation, contract, form, agreement, order or agency action which would violate this section.

(Jurisdiction) Add to Section 5 concerning Reprisals a new subsection (a):

Section 2302(a)(2)(A) of title 5, U.S. Code, is amended by inserting the following:

"(x) the granting or revocation of a security clearance or of access to classified information or a secured installation;"

Note 7

Systems Protection Board to assume jurisdiction and to adjudicate appeal of denial on its merits. *Marinetti v. EEOC*, MSPB 1984, 24 M.S.P.R. 276.

9. Burden of proof.

Employee did not prove allegation of prohibited reprisal by preponderance of the evidence. *en*

Service did not establish that officials who took suspension action against employee had knowledge of his EEO complaint, moreover, five years elapsed between EEO matter and the suspension. *Harrison v. Department of Army*, MSPB 1985, 29 M.S.P.R. 294.

§ 2302. Prohibited personnel practices

(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section—

(A) "personnel action" means—

- (i) an appointment;
- (ii) a promotion;
- (iii) an action under chapter 75 of this title or other disciplinary or corrective action;
- (iv) a detail, transfer, or reassignment;
- (v) a reinstatement;
- (vi) a restoration;
- (vii) a reemployment;
- (viii) a performance evaluation under chapter 43 of this title;
- (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and
- (x) any other significant change in duties or responsibilities which is inconsistent with the employee's salary or grade level;

with respect to an employee in, or applicant for, a covered position in an agency;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include—

- (i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or
- (ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.

(C) "agency" means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include—

- (i) a Government corporation;
- (ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or
- (iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

- (1) discriminate for or against any employee or applicant for employment—
 - (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
 - (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 623a);
 - (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));
 - (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for—

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) a disclosure to the Special Counsel of the Merit Systems Protection Board, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

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